United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,105

UNITED STATES OF AMERICA

Appellee

v.

WILLIAM E. TURNER

Appellant

BRIEF FOR APPELLANT

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United States Court of Appeals
for the District of Columbia Circuit

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CLERK

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TABLE OF AUTHORITIES

*Cases and authorities chiefly relied on are marked by asterisks.

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Appeal from the United States District Court
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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED

I.

Where the evidence presented by the Government indicates exactly the manner in which the Appellant obtained possession of an alleged narcotic drug, that possession being momentary, and said evidence conclusively negated that the Appellant purchased, sold, dispensed or distributed said narcotic drug, was it proper for the Court to instruct the jury under Title 26,

Section 4704 that that possession of the narcotic drug was prima facie evidence of a violation of Title 26, Section 4704(a) by the Appellant?

II.

Was there sufficient evidence adduced at trial to permit the Trial Court to give an instruction of aiding and abetting?

III.

Where the evidence shows that the Government made secret tape recordings of alleged conversations in a hotel room participated in by Appellant, one of the co-defendants and an undercover agent, should these recordings have been made available to the Appellant under the Federal Rules of Criminal Procedure, the Jencks Act, or Brady v. Maryland, 378 U.S. 83 (1963)?

IV.

Was it error for the Trial Court to deny the Appellant's Motion to strike the testimony of the Government Agent who was involved in a recorded conversation where it is indicated that he discussed the contents of said conversation with other agents who had listened to said recorded conversation?

V.

Should the Appellant's conviction be reversed because it was obtained as a result of evidence tainted by an illegal electronic surveillance?

VI.

Where the Government does not prove its chain of custody of the narcotic which was received in evidence by the Trial Court, one of the Agents who had custody of the alleged narcotic not having testified as to what he did with the narcotic while it was in his custody, should the Appellant's conviction be reversed?

VII.

Is the Government's referral to Appellant and other co-defendants by their "nick-names" during voir dire and opening statements prejudicial to the Appellant in that it suggests to the jury that Appellant had a criminal record and does such violate Appellant's constitutional right not to be required to testify against himself?

VIII.

Do the cumulative effects of errors alleged constitute reversible error?

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*This case had not been before the Court on any previous occasion.

REFERENCE TO RULINGS

References are to Appendix pages and designated "A.__"

1. January 26, 1970, Trial Court denial of Pretrial motion to dismiss for failure to produce electronic recordings — A. 82

2. January 26, 1970, Trial Court denial of Pretrial motion to suppress testimony of Agent Pope — A. 82

3. January 27, 1970, denial of objection to use of "Nick-Name" voir dire — A. 93

4. January 27, 1970, Trial Court denial of Appellant's motion to strike testimony of Agent Pope for failure to produce electronic tape recordings — A. 135, 136

5. January 27, 1970, Trial Court denial of motion to dismiss case under the Jencks Act — A. 135, 136, 137

6. January 29, 1970, Objection to introduction of container of narcotics on grounds of lack of testimony as to chain of possession on the part of the Government — A. 283

7. January 29, 1970, denial of motion for acquittal on the grounds that momentary possession is insufficient to invoke statutory presumption under Title 26, Section 4704(a) — A. 290

8. January 29, 1970, denial of motion for acquittal on the grounds that Appellant was not an aider and abetter — A. 290

9. January 29, 1970, denial of motion of acquittal for failure to prove continuity of chain of custody — A. 317

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is founded on 28 USC 1291.

STATEMENT OF THE CASE

On January 31, 1970, Appellant William E. Turner, hereinafter called "Turner" was convicted of violation of the Federal Narcotic Laws, 26 U.S.C. 4704(a) and 26 U.S.C. 4705(a) following acquittal on a charge under 21 U.S.C.174.

Turner and two co-defendants, Carlton E. Bryant (Appellant in case No. 23,957 now before this Court) and Herbert W. Johnson were jointly indicted for three narcotic offenses 26 U.S.C.4705(a) (sales count), 26 U.S.C.4704(a) possession count) and 21 U.S.C.174 (importation count) allegedly occurring on January 31, 1969.

Turner was convicted solely on the testimony of Government Agent, Federal Bureau of Narcotics and Dangerous Drugs Agent, John B. Pope (hereinafter called "Agent Pope"). At trial, Agent Pope gave an uncorroborated rendition of a conversation which allegedly involved co-defendants Bryant and Johnson and himself in a hotel room on January 31, 1969, at about 12:00 o'clock noon, at which meeting Turner was not present. Some ten hours or so later there was another conversation in the Agent's room which was recorded and which

allegedly involved co-defendant Johnson, Agent Pope and Appellant Turner.

Both the aforesaid conversations were secretly electronically recorded and simultaneously listened to through the recording machine by other Government Agents, principally Government Agent Gary D. Warden. Subsequent thereto, Agent Pope met with Agent Warden and discussed the conversations within said room in a general manner. The tape recordings were not available at trial even though the Government was placed on notice that at least one of the defendants wished to discover their contents shortly after April 13, 1969 when co-defendant Bryant was arrested, and at least as early as the preliminary hearing on June 19, 1969, and in writing at least as early as September 11, 1969. The only testimony that appears relating to Turner's involvement was his holding a plastic baggie in which the co-defendant Johnson placed some white powder, later identified as a narcotic drug, which defendant Johnson removed from the container hidden in the rear of a television set in his house. Agent Pope at one time described this as having taken a matter of seconds after which defendant Johnson took said baggie from Turner. This is the sole time that it appeared Turner had any contact with the alleged narcotic.

In the Court's charge to the jury, in spite of the fact that Agent Pope had set forth in detail the manner in which defendant Turner had contact with the alleged drug, the Court instructed the jury that possession of a narcotic was prima facie evidence of a violation of 4704(a) and from this fact alone, the possession of a narcotic drug, the jury could infer that the defendant (Turner) was guilty of the offense.

PRETRIAL PROCEEDINGS AT TRIAL

The Government put on its case as follows: Agent Pope was called as a witness for the Government. He stated that he rented a room in the Holiday Inn Motel and had a conversation with co-defendant Johnson therein on the 30th of January, 1969, in which he told Johnson he would like to purchase some heroin.

On January 31, about 12:00 noon Johnson and Bryant came to Agent Pope's room and negotiated for the purchase of some heroin. Later that night, approximately 10:30 P.M., Agent Pope accompanied Johnson and co-defendant Turner to Johnson's house in Washington, D.C. whereat Johnson took a larger bag of heroin from behind a television set, measured out 36 spoons of heroin on the table top in the room and asked Turner to hold a plastic baggie in which he (Johnson) placed the contraband and then took the baggie from Turner. This period for which Turner held this "baggie" was described as a matter of seconds at one

point and, on another, perhaps as long as a couple of minutes. The testimony elicited from Agent Pope was such that it was apparent that Turner had no conversation with regard to the particular narcotic up until the time they went to Johnson's home (A.116-117)*. It is apparent throughout the testimony that any conversation that was held by Agent Pope and Turner was not related to the sale of the narcotics here in question, but of a general nature (A.116) and nowhere does it appear that Turner was involved in any of the negotiations but was merely present (A.116-122).

At Pretrial it was learned that the tapes of the conversations held in the hotel room of the narcotics Agent had been discarded (A.13). Motions were made by defendants to dismiss indictment and suppress the Agent Pope's testimony.

Agent Warden testified that he and other Agents had set up electronic device for taping conversations in Agent Pope's room and this equipment was comprised of a microphone in a tube extending through a hole in the wall between Agent Pope's room (No. 607) and Agent Warden's adjoining room (No. 608). The microphone was attached to the recording machine (A.39).

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*Where (A.__) is used it refers to Appendix in case No. 23,957

Conversations in Agent Pope's room were constantly monitored and conversations recorded on tape. Agent Warden did not know what happened to the tapes (A.30,37,41) and his excuse for their not being accounted for was that they were not made to be used as evidence and only if an informer had been involved would the tapes had been preserved (A.30,32). Agent Warden stated he had played the tape back (A.38) and it was possible that information that Pope put in his report to his superiors came from the tape (A.30,31).

Agent Warden took no steps to preserve the tapes or to ascertain whether the U.S. Attorney wished him to preserve it (A.36).

In December of 1969 when the Government's Counsel requested the tapes for the first time (A.43) Agent Warden could not locate the tapes (A.37). A Court Order was not secured by Agent Warden to monitor said conversation (A.31).

Agent Pope was aware the conversations were being recorded (A.47) and while he said he never heard the tapes and no Agent told him what the conversations were (A.50), he did state on cross-examination that the tapes were available to him (A.44) and he had discussed the contents of the monitored conversations with the Agents who were doing the monitoring (A.61,62).

Agent Pope indicated only when a person other than an Agent was involved would such tapes be saved (A.57).

TRIAL PROCEEDINGS

Agent Pope testified he rented Room 607 at the Holiday Inn Motel and on January 30, 1969 had a conversation with co-defendant Johnson regarding the desire to purchase heroin from Johnson (A.109). On January 31, 1969 at approximately 12:00 o'clock Johnson and Bryant came to Agent Pope's room and entered into negotiations for the purchase of heroin (A.109). Later that night, at about 10:30, co-defendants Johnson and Turner met Agent Pope at his hotel room where Turner was introduced by Johnson to him as one "handling a little of Mr. Johnson's business and was a runner." (A.114). Conversations were held at that time in the room of a general nature (not apparently related to the sale of the narcotics in question in this case) (A.116,117). Agent Pope accompanied by co-defendants Johnson and Turner went to Johnson's house in Washington, D.C. where Johnson opened the door with a key, went into the dining area and removed a large plastic bag from behind a television set, removed 36 spoons of powder, placed it on the glass top of the dining room table (A.118), asked Mr. Turner to hold a plastic baggie and then with the use of business cards or

playing cards put the heroin into one pile and then put it in the plastic baggie which Mr. Turner was holding. Johnson then placed the plastic baggie in a piece of tinfoil and handed it to Agent Pope (A.119). They continued to have general conversations (A.120). At the hotel co-defendant Johnson was paid the money for the heroin (A.121).

The envelope was identified by Agent Pope as the one he received from co-defendant Johnson and on which he placed his initials "J.E.P." (A.122-123). Objection was made to the testimony of Agent Pope as to what co-defendant Johnson had told him regarding the narcotics traffic of Appellant Turner (A.114), and again at (A.124). On cross-examination by Appellant's attorney, it was established that at Mr. Johnson's home, Turner only held the bag and did not touch the narcotics (A.129-130). Agent Pope stated that (in hotel room) Turner indicated "he would bring cocaine when needed, the cocaine to come from Mr. Johnson and he would act as the runner to bring it to Detroit." (A.131). Motion was again made for production of tapes, counsel for co-defendant Turner citing Withers v. U.S., 303 F.Supp. 641 (1969)(A.132).

The offer of Mr. Turner to bring cocaine to Agent Pope was the same offer that had earlier been made by a Mr. Gary on January 30 (A.138-149).

Agent Pope stated that he sat down with the other surveillance agents and tried to reconstruct the hotel room conversations (A.170,175,176). This is contrary to his Pretrial testimony (A.50) that no agent told him what the conversations were. After the transaction in Johnson's house, Johnson and Turner returned to Agent Pope's hotel room and stayed another forty-five minutes to an hour, after which Agent Pope met with Agent Warden in the next room and discussed the case and again downtown (A.203-205).

Agent Pope saw the electronic equipment being set up in the hotel and was familiar with it (A.181-186). Over objections, the Court permitted the Government to rehabilitate the Agent Pope by reading over the testimony he gave before the Grand Jury (A.215-219).

Agent Pope was cross-examined by co-defendant Johnson's counsel for the remainder of the afternoon of January 30, 1970 (A.222-264) in an attempt to establish entrapment. The co-defendant Turner was not mentioned in this cross-examination.

Agent Cooper on January 31, 1969 (T.229)* observed Turner arrive with Agent Pope and co-defendant Johnson at

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*Where (T.__) is used it refers to the trial transcript page number which is not included as part of the Appendix heretofore referred to.

Johnson's house, walk inside, stay approximately ten or fifteen minutes, leave and go back to the hotel where they went inside and then co-defendants Johnson and Turner left and returned to Johnson's house, after which he broke off surveillance, returned to the hotel and went to Agent Pope's room where he observed a white powder which Agent Pope alleged to have bought (T.233-235). Agent Cooper never saw or never overheard any conversation between Johnson, Turner and/or Pope (T.240-241).

Chemist Washington testified to the fact that the drug he received was a narcotic. He testified he received it from Agent Warden (T.268). Motion was made by counsel for Judgment of Acquittal since the Government had not shown continuity of change of custody of the alleged narcotic from Agent Pope to the chemist (A.280). Motion was denied (A.282). Motion was made on behalf of Turner for Judgment of Acquittal for failure to grant discovery of wire tap citing Withers v. U.S., 303 F.Supp. 641 (A.283). Motion on behalf of Turner for Acquittal on the grounds of insufficient evidence was raised in that there was no showing that co-defendant Turner in any way sold the particular narcotics (A.283-284).

Appellant Turner's counsel indicated to the Court the statutory presumption supporting illegal importation and

possession is not applicable in this instance (A.234). The Court gave an instruction which indicated that there was a presumption that possession supported violation of the crime charged under Title 26 Section 4704 (A.396,397). Objection to instruction of aiding and abetting was made by Turner's counsel (A.323-324).

After the testimony of Agent Cooper, Turner rested his case (A.323-324).

Agent Warden was called on behalf of co-defendant Bryant only. He testified that he monitored conversations which were held between Agent Pope, Johnson and Bryant using their device connected to the recording apparatus (A.328-334) including the conversation defendant Turner may have had (A.360).

The tape would have been saved if an informant had been in the room negotiating the sale (A.367). Prior to this statement, Agent Warden indicated that a Mrs. Snipes, an informer, was in Agent Pope's room when co-defendant Johnson was possibly there (A.337).

ARGUMENT

I.

THE COURT ERRED IN INSTRUCTING THE JURY THAT POSSESSION OF THE NARCOTICS WAS PRIMA FACIE EVIDENCE OF VIOLATION OF 26 U.S.C. 4704(a).

Ordinarily if one were to be seen with a narcotic in his possession even though it be for a short duration such as the time it would take one to toss it from a window, as was the case in Matthews v. United States, U.S. App. D.C. No. 21,238, August 27, 1969, possession for a considerably greater duration and culpability than what could actually be observed would be warranted. This situation, plus the finding of paraphernalia of the type standard in narcotics use lying atop a bureau as the officers entered, warranted the jury to infer that the room would have been the site of recent or contemplated drug use and that the possession of the drugs was for a sufficient period of time and prima facie evidence of violation of the sub-section by the person who threw them from the window. From these facts the Court held:

> "To a jury, this chain of events could so color the one observed act - appellant's toss of the vial from the window - as to enable a finding that his possession was of considerably greater duration and culpability than what could actually be seen. A possession activating the statutory

> presumption may be proven wholly by circumstantial as well as by direct evidence, and assuredly by an admixture of both kinds. Here the events portrayed by the evidence bespoke combinationally a prior guilty possession of the narcotics by appellant and an effort to rid himself of them before the officers came into the room. We think it clear that such a possession affords 'substantial assurance that the presumed fact' - that appellant obtained the drugs by a purchase not in or from the original stamped package - 'is more likely than not to flow from the proved fact on which it is made to depend.'"

In Turner's case, however, we have a different set of facts which would not allow that inference. That is to say, the Government by his testimony has negated the very prima facie situation that is contemplated by possession. It showed exactly how Turner got momentary possession of the narcotics. It was not by sale, it was not by purchase, nor was it dispensed or distributed by him. He merely held a baggie in which the narcotic was placed and it was taken away from him immediately. It is submitted, when the Government goes beyond the showing of possession and shows the manner in which the possession took place, the instruction that possession is prima facie evidence of violation cannot be used. Matthews, supra, is different from the case at issue in that in Matthews the inference raised was that possession was more than momentary

possession because of other factors involved. In Mr. Turner's case we know exactly what happened and the Government's testimony voids the presumption under the Act. In Smith v. U.S., C.A.Tex. (1967), 385 F.2d 34, it was held that the imputed possession of narcotics by fact of conspiracy did not activate the presumption of guilt arising from possession of narcotics.

The giving of the instruction in which possession was to be considered as prima facie evidence of a violation of 26 U.S.C. 4704(a) so tainted the instruction relative to 4705(a) that the jury could not properly separate the two charges and, therefore, the conviction under this latter section (sales count) should be reversed as well as the conviction under the former (sales count). There was no testimony relative to Mr. Turner's furthering or participating in the negotiations for the sale of the narcotics to Agent Pope. The substance of Mr. Turner's involvement or rather lack of involvement in the sale is plainly indicated by the testimony that Agent Pope gave while testifying before the Grand Jury. It appears that what Turner told Pope was. . .

> "That he was a runner for Mr. Johnson, that he did a little handling of his business for him and we discussed cocaine and he told me if I ever needed any cocaine, he would bring it down to Detroit for me." (A.218-219)

There is nothing to indicate that Turner in any way had any part in negotiating for the sale of the narcotics in question.

II.

THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO GIVE AN INSTRUCTION ON AIDING AND ABETTING.

The Government has merely shown what amounts to presence at the scene of the alleged crime and a momentary holding of a baggie in which the narcotic was placed. There is no showing that the Appellant collaborated to effect the sale of the particular drug in question. There is no showing that the Appellant, Turner, associated himself with the venture, the selling of the narcotic. At most, you have the momentary possession by Turner which appears to have been, by the very testimony of the federal agent Pope, an action which took place merely by happenstance. It was though anyone being present in the vicinity had been asked to do a "favor." In Bailey v. United States, 135 U.S.App. D.C.95 (1969) 416 F.2d 1110, the Court held that the mere presence of a defendant at the scene of a crime, in that case a robbery, was not sufficient to give an aiding and abetting construction. In Bailey, supra citing from Nye & Nissen v. United States, 336 U.S. at 619, 69 S.Ct. at 769, quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), it was said at p.98:

> "In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

All the discussions relating to defendant Turner were of the nature of other matters not involved with the particular transaction in question. The Court further said:

> "An inference of criminal participation cannot be drawn merely from presence; a culpable purpose is essential. In Hicks v. United States, the Supreme Court recognized that the accused's presence is a circumstance from which guilt may be deduced if that presence is meant to assist the commission of the offense or is pursuant to an understanding that he is on the scene for that purpose. And we have had occasion to say that '[m]ere presence would be enough if it is intended to and does aid the primary actors.' Presence is thus equated to aiding and abetting when it is shown that it designedly encourages the perpetrator facilitates the unlawful deed - as when the accused acts as a lookout - or where it stimulates others to render assistance to the criminal act. But presence without these or similar attributes is insufficient to identify the accused as a party to the criminality." [See cases cited as footnotes in Bailey.]

The Court further said in Bailey, supra, that:

> ". . . an accused's prior association with one who is to become a criminal offender, even when coupled with the accused's later presence at the scene of the offense, does not warrant an inference of guilty collaboration."

There is nothing in the instant case to show intent to aid and abet in the commission of the crime of selling of the narcotics. The holding of the baggie was a momentary thing which does not clearly indicate the intent of defendant Turner to become a party to the sale. Turner's presence at the scene and his momentary possession does not warrant an inference of guilty collaboration.

The Government's testimony of the subject of aiding and abetting was only that the appellant was present and that he momentarily handled the baggie in which the drugs were placed. This, it is submitted, is insufficient to allow the inference of criminal participation in the crime which is charged, to wit, violations of the Narcotics Act as related to sale, purchase, distribution and dispensing.

III.

APPELLANT'S CONVICTION SHOULD BE REVERSED SINCE IT WAS OBTAINED IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW, WHERE THE GOVERNMENT FAILED TO PRESERVE TAPE RECORDING OF A CONVERSATION ALLEGEDLY HELD IN A HOTEL ROOM INVOLVING APPELLANT AND A GOVERNMENT AGENT, WHICH TAPE RECORDING SHOULD HAVE BEEN AVAILABLE TO APPELLANT UNDER THE FEDERAL RULES OF CIVIL PROCEDURE, THE JENCKS ACT, OR BRADY v. MARYLAND 373 U.S.83 (1963)

Turner was entitled to have access to the tape of the conversation in which he is alleged to have been a participant,

in accordance with due process of law, the tape having been secretly made without his knowledge, and the conversation or the lack of his participating in the conversation was evidence which could have possibly exculpated him. Under any or all of the following theories the Trial Court should have dismissed the indictment against Turner for the Government's failure, whether it be negligent or intentional, to preserve and produce said tape so that counsel for Turner could intelligently prepare his case and effectively cross-examine the Agent Pope. The failure to produce the same whether intentional or negligent had the same effect of denying Turner due process of law.

RULE 16(a)

Under the Federal Rules of Criminal Procedure section 16(a) the Court may grant a defendant access to his own recorded statement. 1/

1/ F.R.Crm. P. 16(a). Upon motion of a defendant the Court may order the attorney for the Government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant or copies thereof, within the possession, custody or control of the Government, the existence of which was known, or by the exercise of due diligence may become known, to the attorney for the Government. . .

That Turner should have access to the statements he made or the tapes of those statements in which he is alleged to have made statements as substantiated by the number of cases United States v. Lumboski, Dt. Ct. Ill., 277 F.Supp. 713 (1967), Miranda v. Arizona, 384 U.S. 436 (1966) as well as this being the practice in the District of Columbia to grant such discovery. See Fryer v. United States, 93 U.S. App. D.C.34, 37, 207 F.2d 134, 137, cert. denied 346 U.S.885 (1953) and United States v. Carter, Dt. Ct. D.C., 15 F.R.D. 367 (1954).

In United States v. Rosenberg, 299 F.Supp. 1241 (1969), secretly recorded conversations made by the Government between Rosenberg and Internal Revenue Service Agent resulted in charges of bribery made against Rosenberg. The Court held that

> "Under 16(a). . . defendant is entitled to inspect and copy his own or recorded statements or confessions unless the Government shows particular and substantial reasons. . . for withholding such materials (citations omitted). . . The word "statements" is literally apt, of course, to cover recordings of defendant's words when he was allegedly offering and giving bribes and gratuities. . . (citing) the obviously deliberate and weighty dictum [in] United States v. Knohl, C.A. 2nd Cir., 379 F.2d 427, 441-442, cert. denied, 389 U.S. 973 (1967) (299 F. Supp. at 1244)"

The reasoning of the Court for its holding emphasizes Turner's difficulties because of the denial of the tape to him:

> "The need of a defendant - and, more importantly, of his lawyer - to have access to his own past statements which are in the Government's hand is just as pressing, and for quite the same kinds of reasons, whether the statements were made during (whether or not a part of) the alleged crime or following it as narratives or explanations. Both kinds of statements will undoubtedly be studied by the Government's witnesses and others involved on the prosecution's side. . . (299 F.2d at 1245)."

In Black v. United States, U.S. Dt. Ct. D.C. 282 F.Supp. 35 (1968) the Court on remand following reversal of the first trial, entered a Pretrial Order making tapes of all conversations available to defendant, apparently under Rule 16(a) or its inherent power under Rule 57(b). This was even though the Government contended it learned nothing from the recorded conversations which bore on Black's case.

Turner was severely hampered by not having the tapes available. He could not cross examine Agent Pope regarding the contents of the conversation, the tapes being the only accurate rendition thereof, and they had been, by reason of the Government's carelessness, negligence or intentional behavior, not available. What did or what did not transpire in the hotel room which would have been evidence by the contents of the tapes could not be used to exculpate the defendant Turner. They are producible under Rule 16(a) as a recorded statement of the accused. United States v. Withers, Dt.Ct. 111, 303 F.Supp.641 (1969).

Lumboski is illustrative. Lumboski was accused of a crime as a result of clandestinely recorded conversations with an undercover agent. The Court in holding that Lumboski was entitled to production of the secretly recorded conversations stated:

> "If confessions are producible under Rule 16(a)(1), the same principles would seem to apply even more compellingly to recorded conversations, particularly because the defendant may not be aware that his remarks are being recorded. It seems logical that the considerations requiring production of statements knowingly and willingly made, should apply a fortiori to incriminating remarks furnished unwittingly to the government. . ."
>
> [Under the Jencks Act] Congress specifically limited the production of such statements [those of a witness] out of concern for the safety of government witnesses. . . No such considerations apply to recordings of a defendant's conversations. To the contrary, the need for such information as an aid to defense preparation far outweighs, in the normal case, the need for pretrial statements of government witnesses (277 F.Supp.721).

The Advisory Committee notes on Rule 16(a), U.S.C.A., indicate that the rule was intended to cover secretly made recordings of an accused:

> "The defendant is not required to designate because he may not always be aware that his statement or confession are being recorded. . . Discovery of statements and confessions is in line with what the Supreme Court has described as the 'better practice' . . . (Cicenia v. La Gay, 357 U.S. 504, 511 (1958).

Rule 16(a) embodies in it a concept of fair play and fundamental due process of law in criminal proceedings. It provides an accused the opportunity of having access to secret recordings to enable his counsel to effectively prepare his case. This is especially true where conversations are alluded to at a time substantially distant from the time of arrest.

While Rule 16's sanctions relate to parties who fail to comply with the Order of Court, Federal Rule Criminal Procedure 16(g),[2/] the Government should not be permitted to devoid the intent of the rule by either negligently or conveniently losing or destroying the evidence which should be preserved if due process of law is to prevail. In view of the fact that the Government had notice that at least one of the co-defendants suspected a tape, it should have been preserved so that it could be "discoverable." Since the Court under Rule 16(g) had broad

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2/16(g) CONTINUING DUTY TO DISCLOSE: FAILURE TO COMPLY. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

authority to enter such Order as being just under the circumstances, justice and fair play and fundamental due process demand that the testimony relating to what transpired on the portion of the taping should have been stricken.

The tape was producible underRule 16(b). In United States v. Isa, 7th Cir., 413 F.2d 244 (1969, United States v. Fossler, Dt. Ct. N.Y. 46 F.R.D.43 (1968) and United States v. Iovinelli, Dt. Ct. Ill., 276 F.Supp.629 (1967), all cases involving secret tape recordings of conversations of an accused with a Government Agent, the Court held, in each case, that the recordings constitute tangible objects within the meaning of Rule 16(b) and the accused, absent a Government showing to the contrary, under section (e) of the rule, had a right to the recordings. In addition, tape was producible under Rule 57(b). Some Courts have held that where the conversation is the basis of the charges, it is unfair to deny an accused access to his recorded conversations. United States v. Rothman, Dt. Ct.___, 179 F.Supp. 935 (1959); United States v. Nolte, Dt. Ct. Calif., 39 F.R.D. 359 (1965).

The tape was producible under Brady v. Maryland, 373 U.S. 83 (1963). In deciding Brady, the United States Supreme Court impressed a heavy ethical burden on the prosecution:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution . . . 373 U.S. at 87."

Justice Fortas, in Giles. v. Maryland, 386 U.S. 66 (1967) saw "no reason to make the result turn on the adventitious circumstances of a request." 386 U.S. at 102.

This Court in Levin v. Clark, 133 U.S. App. D.C.6, 408 F.2d 1209 (1967) adopted and expanded the responsibilities placed on the prosecution by Brady and Giles, supra. The Court focused on possible harm - an erroneous conviction - to the defendant and formulated the following standard under which the Government must operate:

> "Where there is substantial room for doubt, the prosecution is not to decide for the Court what is admissible or for the defense what is useful. . . We focused upon the ultimate possibility of harm to the defendant - the possibility of erroneous conviction - and we stated the standard in terms of whether the evidence "might have led the jury to entertain a reasonable doubt about [defendant's] guilt". . . citing Levin v. Katzenbach, 124 U.S. App. D.C. at 162, 363 F.2d at 291" (133 U.S. App. D.C. at 9)

The Court in Levin, in formulating this standard catalogued various kinds of evidence other Courts have held must be produced - favorable evidence, material evidence, pertinent

facts relating to the defense, information impinging on a vital area to the defense, evidence vital to the accused in planning and conducting their defense, and evidence that may reasonably be considered admissible and useful to the defense. The clandestinely recorded tapes in this case would qualify under any of the above tests. While the tape was not admissible by the Government, certainly Turner would not have been precluded from moving its admission. The tape should have been retained by the Government. It was not for them to determine the admissibility or usefulness of the tapes to the defendant. Since they had made this tape, it was their responsibility to maintain it until at least the case was tried and all issues determined. The Government's responsibility is to see that the truth emerges and that a fair trial be had in accordance with due process of law. Giles, supra, 386 U.S. at 98. Brady is indicative of the recognition of the Court that failure of the prosecution to furnish exculpatory material or that which may be so is violative of due process, irrespective of good faith or bad faith of the prosecution. The same should hold true for such material as lost, mislaid or destroyed by the prosecution. Dereliction of its responsibility should result in the reversal of the conviction and dismissal of the indictment against Turner.

The tape for recording which Turner was party, was producible under the Jencks Act, 18 U.S.C. 3500 [3/]. It provides that after a witness called by the Government has testified, upon motion the defendant is entitled to production by the Government of any statement which relates to the subject matter to which it has been testified to. This is so for the entire contents of any such statement. Sanctions for failure to do so require the Court to strike the testimony of the witness. 18 U.S.C. 3500(b)(d). Under 18 U.S.C. 3500(e) a recording such as was made in the instant case is contemplated under the Act. Further, such a recording is statement of the witness himself and should be produced under said section (e). In Augenglick v. United States, 393 U.S. 348 (1969), the Court held the tapes were covered by the Jencks Act where a tape recording was made of an interview of a soldier with a Government investigator following his being accused of a crime.

In DeFreese v. United States, 5th Cir., 270 F.2d 737 (1959) a tape was held producible where a Government inspector secretly recorded a conversation he had with the defendant.

In United States v. Birnbaum, 2nd Cir., 337 F.2d 490 (1964) I.R.S. agents secretly recorded conversations with the

3/ The text of the Jencks Act is reproduced in Appendix at A.439.

defendant and based thereon he was charged with a criminal offense. Transcripts of the recorded conversations were considered statements made to a Government Agent. The case was limited to the situation where the recordings were made at the Government's direction and the object of the conversations "was to garner evidence of appellant's complicity in the bribery scheme. . ." 337 F.2d at 498. Since the recording of Agent Pope's conversation with Turner were made at the election of federal agents and the object of the meeting was to "garner evidence" against Johnson and Turner, the facts are similar to those of Birnbaum.

It is urged that recordings of the type involved in this instance should be producible under the Jencks Act in keeping with more liberal discovery procedures and concepts of due process of law and fair play.

It is suggested that under any of the foregoing theories the tape should have been produced. The Government's reason for making this tape, for protection of the Agent's safety, is at best a shallow one. For the purpose of protecting the Agent, all that was necessary was some sort of a device by which the Agent in the other room could merely listen. Once the tape was made, the Government has responsibility to maintain and keep the same until such time as the case has been fully determined.

It can only be inferred by the failure to produce this tape that if it were produced it would have exculpated Turner.

It appears that the Government is attempting to join Turner in a very weak case, based on a transitory and momentary handling of a baggie allegedly containing a narcotic, with a relatively strong one against co-defendant Johnson who, it is alleged, made direct transfer of heroin for money. The Government was using guilt by association in that Turner was present at the occurrence.

IV.

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF AGENT POPE BY REASON OF THE GOVERNMENT'S FAILURE TO PRODUCE THE ELECTRONIC RECORDING.

Irrespective of the reason for the loss of this tape either by reason of the negligence or intentional destruction, the Government cannot avoid the Jencks Act's sanctions by merely proclaiming a loss, 18 U.S.C. 3500(e). It is submitted the Trial Court erred in not granting the Motion made on behalf of Turner (A. 314-316,317).

V.

SINCE APPELLANT'S CONVICTION RESULTED FROM EVIDENCE TAINTED BY AN ILLEGAL ELECTRONIC SURVEILLANCE, IT SHOULD BE REVERSED.

Since the Government admitted that it taped the

conversation in which Appellant Turner was involved, the tape was available to Agent Pope who was part of this conversation, and he consulted with the Agents in the adjoining room regarding the contents contained on the tape, and this was conducted without Order of Court, the evidence was tained by the illegal surveillance and the conviction should be reversed. Under Title 18 U.S.C.2510 et seq., communications of the type here in question may not be intercepted without prior judicial authorization.

Since Agent Pope consulted with other Agents who listened to the conversation and discussed the conversation with them, the conclusion is inescapable that Agent Pope's notes, reports and his testimony before the U.S. Commissioner and the Trial Court were influenced and tainted by the illegal activity. The interceptions of such communications can only be authorized when properly applied for within the framework of the Act. This was not done in the instant case.

In Katz v. United States, 389 U.S. 347 (1967), the Court announced the current exclusionary rule on illegally obtained electronic surveillance. That is, Government recordings of private conversations without prior judicial control are inadmissible. See United States v. Jones, Dt.Ct.D.C. 292 F.Supp. 1001 (1968).

Because the defendant must go forward with evidence demonstrating taint, the Court in Alderman v. United States, 394 U.S. 165 (1969) indicated that all records of an illegal electronic surveillance must be turned over to the defendant prior to any determination by the Trial Court as to whether the evidence introduced at trial was tainted by the illegally conducted surveillance.

In Alderman, the Government conducted an illegal electronic surveillance of certain conversations, but the tapes thereof were not mentioned or admitted in evidence at the trial. The Court rejected the Government's ex parte declaration of non-relevance and referred the matter for an adversary hearing to the District Court. In holding said electronic evesdropping illegal, the Court said:

> "Nor should those who flout the rules escape unscathed. In this respect, we are mindful that there is now a comprehensive statute making unauthorized electronic surveillance a serious crime [18 U.S.C.2511]. The general rule under the statute is that official electronic eavesdropping and wire tapping are permitted only with probable cause and a warrant. (394 U.S.175)."

The Court concluded that a defendant had an absolute right to the surveillance records of an illegal electronic surveillance. The Court said that a hearing is required, and:

> "The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint. '[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was the fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.' Nardone v. United States, 308 U.S.338, 341 (1939). With this task ahead of them, and if the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the Government was not entitled to use in building up its case against them. 394 U.S. at 183)."

In Taglianetti v. United States, 394 U.S. 316,317 (1969) the Court held that the defendant was entitled to see a transcript of his conversation overheard by unlawful electronic surveillance.

Since the evidence is clear in this case that no Court authorization was obtained for the electronic surveillance, Alderman requires that this Court order the tape be turned over to Turner and that an adversary hearing be held in the District Court on whether Agent Pope's testimony was tained. In the absence of production of such tape, Turner's conviction should be reversed.

In Desist v. United States, 394 U.S. 244 (1969) a prosecution for conspiracy to violate federal narcotic laws, defendant's conversations in a hotel room were taped by federal agents in an adjacent room. The Court reiterated the rule of Katz supra,but in affirming the conviction said the rule was prospective only. The Court, however, in stating that the rule was absolute said:

> "Every electronic eavesdropping upon private conversations is a search or seizure [and] can comply with constitutional standards only when authorized by a neutral magistrate. . . 394 U.S. at 246)."

Since the facts in Turner's case also took place after the decision in the Katz case, Turner's case comes within the holding of Katz.

VI.

THE GOVERNMENT DID NOT PROVE ITS CHAIN OF CUSTODY OF THE NARCOTIC WHICH WAS RECEIVED IN EVIDENCE BY THE TRIAL COURT OVER OBJECTION OF ALL COUNSEL, SINCE AGENT WARDEN DID NOT TESTIFY WHAT HE DID WITH THE NARCOTICS AFTER HE RECEIVED IT FROM AGENT POPE.

The testimony was that Agent Pope received the narcotics from Johnson and that he, in turn, turned the narcotics over to Agent Warden. The chemist testified he tested certain narcotics that he received from Agent Warden. What Agent

Warden did was not testified to and what steps, if any, he took to insure there was no mix-up in the narcotics with evidence from other cases, was something the jury was entitled to hear from Agent Warden.

In Novak v. District of Columbia, 82 U.S. App.D.C.95, 160 F2d 588 (1947) the testimony of a chemist regarding his analysis of a sample of urine taken from a bottle labeled with Appellant's name and bearing the initials of a police officer, was accepted in evidence over Appellant's objections. The police officer who secured the sample was present in Court and testified to the manner in which he labeled the flask containing the Appellant's urine and how he placed his initials on the label.

The chemist, when he testified, had beside him the bottle of urine in which he had made an analysis. No effort was made to hand to the police officer, who was present in Court, the bottle the chemist used to see if he could identify it as the bottle he had labeled and initialed. The Court held that there was a missing necessary link in the chain of identification, and reversed the judgment. See also Gass v. United States, 135 U.S. App. D.C. 11 , No. 21,198, January 29,1969, 416 F.2d 767.

VII.

THE GOVERNMENT IMPROPERLY REFERRED TO APPELLANT AND OTHER CO-DEFENDANTS BY "NICK-NAME" PRIOR TO ANY EVIDENCE BEING RECEIVED.

The Government's Attorney, both during voir dire and his opening statement, referred to Turner by his nick-name "Boxy" and referred to the co-defendants Johnson and Bryant by their respective nick-names. Such a reference to nick-names was to suggest to the jury that the parties had criminal records and thereby violated Turner's constitutional rights not to be required to testify against himself. In McFarland v. United States, 80 U.S. App. D.C. 196, 150 F.2d 593 (1945) the Court said that such a statement even if accurate was improper. The Court went on to say:

> "To tell the jury that the defendant used different names and that he was charged ' in this case' with. . . was to suggest to the jury, however unintentionally, that he had a criminal record."

VIII.

CUMULATIVE EFFECT OF ERRORS WARRANT REVERSAL.

While it is the position of the Appellant that any one of the aforementioned errors allegedly committed is sufficient to warrant reversal, it is submitted that should this

Court feel that there is no single error warranting reversal, the cumulative effect of the various errors alleged certainly does warrant a reversal.

CONCLUSION

For the reasons cited, the judgment of conviction on each count should be reversed by this Court and judgment of acquittal entered or such other relief be granted as to this Court may seem just and proper.

Respectfully submitted,

David Applestein
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Appointed Counsel for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24,105

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 11 1971

Nathan J. Paulson
CLERK

UNITED STATES OF AMERICA

Appellee

v.

WILLIAM E. TURNER

Appellant

PETITION FOR RE-HEARING WITH SUGGESTION OF
RE-HEARING EN BANC

Comes now Appellant, William E. Turner, by and through appcinted Counsel, David Applestein, and files this petition for re-hearing with a suggestion of re-hearing en banc.

Appellant Turner along with Appellant Carlton E. Bryant, No. 23,957, were convicted of offenses involving the sale of heroin.

This sale was allegedly negotiated and concluded with an undercover agent for the Bureau of Narcotics and Dangerous Drugs, Agent Pope. During the course of the trial it was brought out that tape recordings of the transactions were made by co-agents of Agent Pope. The tapes were lost according to Agent Warden, the agent in charge. The Bureau had guide lines under which there was a requirement that there be a preservation of these tapes for a period of ten years. On remand hearing from this Court to determine the circumstances relating to the missing tape, it was contended by Agent Warden that the tape was "lost", after he had attempted to play the tape and found it to be unintelligible.

In the initial opinion of this Court of January 29, 1971, it was found by this Court through its reading of the transcript of the proceedings at trial that:

> "Apparently the quality of the recording was adequate, since Warden testified that he could hear the conversation and could identify the speakers". 1

The very purpose of the rule promulgated with regard to making of tapes wherever feasible, marking of them so they would not be lost, and the preservation of them is completely thwarted in the case at issue, if sanctions are not enforced against the Government.

1 Page 7 of Slip Sheet Opinion decided January 29, 1971, No. 23,057 & No. 24,105.

While it is not necessarily contended in this instance that there is any secreting or intentional destruction of the tape, the inherent danger does exist and therefore, expecially in view of the strong desire of the Government to obtain a conviction in this instance, such a possibility cannot be ignored. In weighing the equities, the appellants should be given the same relief as they would have received were their case to have been heard in the future. In the case at issue, as this Court has indicated, the conduct of the agent in charge was extremely negligent and in direct violation of Bureau Rules which would surely result in imposition of full sanctions in the future.[2]

Important litigation would be materially discouraged if the approach suggested by the Court in this case were to prevail for the purposes of expedience or practicalities rather than the individual case. Litigants bring their cases to the appeals level, not for future litigants to necessarily reap the benefits, but for their own protection and benefit. It is of great importance to the progress of the law and justice that litigants be not discouraged from bringing to the attention of the Courts such matters as are at issue in the instant case. Good administration of justice will only be fostered by permitting

[2] See page 24, Slip Sheet Decision; No. 23,957 and No. 24,105.

the one bringing the matters to the Courts attention to receive benefits therefrom if his contentions are well taken.

It is submitted that the balancing approach which the Court indicates it has adopted in this case should be re-considered. Where illegal wiretaps lead to the obtaining of evidence which may be as strong as the evidence of guilt as announced in this case, nevertheless, such ill-gotten evidence cannot sustain a conviction. So should the result, it is submitted, be in the instant case.

On the remand, testimony differing from that which this Court had deduced from its reading of the transcript of trial was presented. Based upon the remand testimony the Court accepted the latter version as to intelligibility of the tape, rather than its original finding that the tape was of adequate quality.[3] The Court found on remand that:

> " * * * * *under the more pragmatic balancing approach which we have adopted for these cases, the unintelligibility of the tapes-when combined with the very strong evidence adduced at trial-outweighs[4] the negligence involved in the loss of tape."

It would appear that the Court may have overlooked its initial determination that the tapes were of an intelligible quality and accepted the word of the agent testifying with regard to the quality of the tapes. It should not be overlooked that the agent

3 See page 7, Slip Sheet Decision, decided January 29, 1971; No. 23,957 & No. 24,105;

4 See page 5, Slip Sheet Decision, Proceedings Following Remand; No. 23,957 & No. 24,105, decided July 28, 1971

was interested in obtaining the appellants' convictions and his testimony should be scrutinized carefully and not given the weight which this Court has given it. It is suggested that the position of the Supreme Court in Augenblick [5], should govern this case, and since there was no attempt on the part of the Government to follow regular procedures promulgated, as testified to in the remand hearing, therefore the sanctions of the Jencks Act and Rule 16 of the Federal Rules of Criminal Procedure should be invoked in this case.

The assertion on the part of the Government that the non-preservation of evidence was excused because it, through its agents, had determined that the tapes were unintelligible and contained nothing of interest to the appellants should not be the deciding factor in whether or not the convictions are sustained. The motives for which the Government would make such contention should be seriously considered by the Court, especially in view of the fact that the Government agents were acting in direct violation to the rules of its Bureau promulgated to prevent this very thing from occurring.

5 See pages 16 and 17, Slip Sheet Decision, No. 23,957 & No. 24,105, decided January 29, 1971

Therefore all considered, it is respectfully requested that this cause be re-heard with a suggestion of hearing en banc.

Respectfully submitted,

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Certificate of Service

Service of a copy of the foregoing Petition for Re-hearing, etc. was made by leaving a copy at the office of the U. S. Attorney, U. S. Court House, Washington, D. C., this 11th day of August, 1971.

David Applestein